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No. 04-1021

In the Supreme Court of the United States

MICHIGAN HIGH SCHOOL ATHLETIC ASSOCIATION, INC.,
Petitioner,

v.

COMMUNITIES FOR EQUITY, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

MOTION AND BRIEF OF *AMICUS CURIAE* MICHIGAN ASSOCIATION OF SCHOOL BOARDS IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

The Michigan Association of School Boards (MASB) respectfully moves this Court to grant it leave to file the attached brief as *amicus curiae* in the above captioned case. Pursuant to Supreme Court Rule 37(2)(b), counsel for *amicus* wrote to counsel for all parties in this action requesting written consent to file this brief. Petitioner has consented to MASB's participation in this matter. A letter attesting to its consent has been submitted to this Court. Counsel for Respondents have withheld their written consent for *amicus* to file this brief, necessitating the filing of this motion. *Amicus* submits that this case raises such crucial issues regarding the management of single sex programs in schools that Respondent's decision to withhold consent should not foreclose participation by interested *amicus curiae*.

Founded in 1949, the Michigan Association of School Boards (MASB) is a voluntary, nonprofit association of over 600 local and intermediate boards of education throughout the State of Michigan. The activities of MASB include training programs and workshops for school leaders, informational support through publications and person-to-person contact, management consulting, policy analysis, legal services, and labor relations representation. The mission of MASB is to provide quality educational leadership services for all Michigan boards of education, and to advocate for student achievement and public education.

The board of education of each school district in Michigan serves as the administrative body entrusted with the management of the public schools within a prescribed geographical region of the state. Under Michigan law, each school board is responsible for the educational programs,

fiscal management, and staffing of the public schools within its jurisdiction.

Thus, MASB has a relevant interest in the development of clear and rational education law and recognizes its obligation to assist the courts in cases involving questions of major significance. Further, MASB has previously been a contributor of *amicus* briefs in this Court in the cases of *Zelman v. Simmons-Harris*, No. 00-1751, 00-1777, 00-1779, October Term, 2000, *Grutter v. Bollinger*, No. 02-241, October Term, 2002, and *Gratz v. Bollinger*, No. 02-516, October Term, 2002.

Because the issue presented by this case has such a direct bearing on how the members of *amicus* and other similarly situated school districts implement single-sex programs, MASB respectfully requests the opportunity to advise this Court more fully of the urgency of review in this matter.

Respectfully submitted,

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TABLE OF CONTENTS

Page

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF i

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

INTEREST OF AMICUS 1

STATEMENT OF THE CASE 2

ISSUE PRESENTED FOR REVIEW 2

Whether *any difference* in the implementation of a single-gender interscholastic athletic or educational program must be characterized as a presumptively unconstitutional gender classification subject to intermediate scrutiny?

SUMMARY OF THE ARGUMENT 2

ARGUMENT 4

I. Single-gender Interscholastic Athletic Programs Will Suffer Irreparable Harm If Any Difference Relating to the Administration of Separate Male and Female Programs Is Characterized as a Presumptively Unconstitutional Gender Classification Subject to Intermediate Scrutiny 4

II. Courts Must Proceed with Caution When Asked to Determine Local Policy Issues on Behalf School Districts 7

CONCLUSION 11

TABLE OF AUTHORITIES

Page

CASES:

Clark v. Arizona Interscholastic Association,
695 F.2d 1126 (9th Cir 1983), *cert. denied*,
464 U.S. 1818 (1983) 3

Dayton v. Brinkman,
433 U.S. 406 (1977) 7

Garrett v. Board of Education,
775 F. Supp. 1004 (E.D. Mich. 1991) 3

Milliken v. Bradley,
418 U.S. 717 (1974) 7, 9

O'Connor v. Board of Education of School District 23,
449 U.S. 1301 (1980) 2-3

Owasso Indep. School Disrict. v. Falvo,
543 U.S. 426 (2002) 9

Regents of the University of Michigan v. Ewing,
474 U.S. 214 (1985) 7, 8

San Antonio Independent School District v. Rodriguez,
411 U.S. 1 (1973) 8

United States v. Virginia,
518 U.S.515 (1996) 3

Vorchheimer v. Philadelphia School District,
532 F.2d 880 (3d Cir. 1976), *aff'd*,
430 U.S. 703 (1977) 3

Wood v *Strickland*,
420 U.S. 308 (1975) 8

Yellow Springs Exempted Village School District Board of Education v. Ohio High School Athletic Association,
647 F.2d 651 (6th Cir. 1981) 3

FEDERAL STATUTES AND REGULATIONS

20 U.S.C. § 1232g 8

20 U.S.C. 7215(a)(23) (Supp. I 2003) 9

OTHER AUTHORITY

United States Department of Education, Office of Civil Rights, July 11, 2003 *Dear Colleague Letter* . . 7

INTEREST OF AMICUS CURIAE

The Michigan Association of School Boards ("MASB") respectfully submits this brief *amicus curiae* pursuant to Rule 37.2(b) of the Rules of the Supreme Court of the United States.[1] Founded in 1949, MASB is a voluntary, nonprofit association of over 600 local and intermediate boards of education throughout the State of Michigan. The activities of MASB include training programs and workshops for school leaders, informational support through publications and person-to-person contact, management consulting, policy analysis, legal services, and labor relations representation. The mission of MASB is to provide quality educational leadership services for all Michigan boards of education, and to advocate for student achievement and public education. MASB has had a longstanding interest in the development and implementation of local school board policies, including those assuring compliance with the Equal Protection Clause and Title IX of the Education Amendments of 1972. *Amicus* believes that to subject school districts to an "exceedingly persuasive justification" standard for all individual differences relating to single-sex programs will subject school officials to the constant threat of litigation for every decision they make in regards to the programs.

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[1] The Petitioner has consented to the filing of this brief. The written consent is on file with the Clerk. Pursuant to Rule 37.6 of the Rules of the Supreme Court of the United States, MASB states that no counsel for any party authored this brief in whole or in part, and no person or entity other than MASB and its counsel made any monetary contribution to the preparation or submission of this brief.

STATEMENT OF THE CASE

We adopt the Statement of the Case as presented by Petitioner.

ISSUE PRESENTED FOR REVIEW

Whether *any difference* in the implementation of a single-gender interscholastic athletic or academic program must be characterized as a presumptively unconstitutional gender classification subject to intermediate scrutiny?

SUMMARY OF THE ARGUMENT

This Court can provide school districts with a definitive ruling on whether minor differences in single-gender athletic and education programs constitute facial gender classifications under the Equal Protection Clause. Unfortunately for school districts in the Sixth Circuit, the Court of Appeals decided this case by classifying *any difference* between male and female programs as a presumptively unconstitutional facial gender classification. This misclassification places school districts in the unfortunate position of justifying any difference in the programs under intermediate scrutiny, which requires establishing an "exceedingly persuasive justification" for the difference. This burden may cause school districts to reconsider the utility of offering single-gender athletic teams and it clearly creates difficulties for school districts that are operating or considering single gender educational programs.

School districts have historically operated athletic programs that include single-sex teams. And, while the practice of affirmatively limiting athletic teams to one gender has been successfully and unsuccessfully challenged under the Equal Protection Clause (*see O'Connor v. Board of Education*

of School District 23, 449 U.S. 1301 (1980); *Clark v. Arizona Interscholastic Association*, 695 F.2d 1126 (9th Cir. 1983), *cert. denied*, 464 U.S. 1818 (1983); *Yellow Springs Exempted Village School District Board of Education v. Ohio High School Athletic Association*, 647 F.2d 651 (6th Cir. 1981), the custom of operating separate and equal teams without such restrictions continues without encountering the same constitutional challenges. The Court of Appeals' decision, however, opens the door for school districts to be besieged with claims of discriminatory treatment relating to even the smallest differences between the separate teams.

Further, numerous elementary and secondary school districts have experimented with single-sex classrooms and schools as a way of providing students with a greater variety of academic opportunities.[2] While some programs have been challenged under Title IX and the Equal Protection Clause, *see Vorchheimer v. Philadelphia School District,* 532 F.2d 880 (3d Cir. 1976), *aff'd,* 430 U.S. 703 (1977); *Garrett v. Board of Education* 775 F. Supp. 1004 (E.D. Mich. 1991), there have been many success stories. *Amicus* does not argue that these single-sex classrooms and schools should not be subject to intermediate scrutiny review that this Court applied in *United States v. Virginia*, 518 U.S.515 (1996). However, if a school board decides to offer a single-sex school in its district that is essentially equal to other schools within the district, should the school board be subjected to repeated constitutional claims over the minute details of administering the school? Such judicial interference with local academic

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[2] According to the National Association for Single-Sex Public Education, at least 156 public school in the United States currently offer gender-separate educational opportunities. www.single-sexschools.org/schools-schools.htm

decision-making would "stifle the ability of the local school board to continue with a respected educational methodology." *Vochheimer,* 532 F.2d at 886.

Whether a school district is administering athletic programs or single-sex schools, it is difficult to imagine how any difference in treatment between males and females could survive the difficult standard of proving an "exceedingly persuasive justification" for the difference.

ARGUMENT

I. Single-Gender Interscholastic Athletic Programs Will Suffer Irreparable Harm If Any Difference Relating to the Administration of Separate Male and Female Programs Is Characterized as a Presumptively Unconstitutional Gender Classification Subject to Intermediate Scrutiny.

It is safe to say that almost all interscholastic athletic programs operate with separate-sex athletic teams. The reasons for single-gender teams vary from citing the physical and psychological differences between males and females to concerns that there would be a substantial risk that males would dominate the female programs and deny females an equal opportunity to compete in interscholastic events without a gender-based classification. *See O'Conner v. Board of Education of School District 23,* 449 U.S. 1301 (1980). In any event, there is clearly a need for separate-sex athletic teams in public schools.

The decision of the Court of Appeals to classify any difference between single-gender teams as a facial gender classification serves to possibly threaten the existence of having separate high school sports teams for males and

females. Because every decision that results in even the smallest difference between single-gender teams has now the potential of turning into a constitutional battle in court, schools may rethink whether offering separate teams is actually worth the risk of violating the Equal Protection Clause.

The operation of just two single-gender athletic teams has the potential of creating a multitude of differences between the two teams, each carrying the threat of an Equal Protection claim that compels the school district to now provide an exceedingly persuasive justification for the distinction. For example, a school district can easily establish substantially equal boys' and girls' basketball teams, but the administration of the two teams could lead to several other minor differences in addition to playing in different seasons, such as:

- If the two teams play during the same season, the teams will have a different coach.
- The teams will have different practice schedules if a gymnasium must be shared.
- The teams will likely have their games officiated by different referees.[3]
- The teams will have different locker rooms.
- The teams will have different uniforms.
- The length of practices may vary between the two teams.

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[3] Ironically, the first three differences that are noted are exacerbated by the change of seasons that the lower courts have mandated. *See* Petitioner's Brief at 14. Thus, the Court of Appeals' decision not only provides a greater opportunity for challenging single-gender athletic programs, it also serves to create additional circumstances that will be ripe for Equal Protection claims.

- The teams may play on different days of the week.
- Cheerleaders may perform at games for one team, but not the other.
- The pep band may play at games for one team, but not the other.
- The athletic boosters may operate a concession stand at games for only one team.

Thus, the differences that result from administering two separate single-gender teams are limitless. Like the scheduling of the teams' seasons, the differences occurred as a result of operating the two teams from a gender-neutral perspective. In other words, the teams have different uniforms because they are different teams, not because one team is made up of boys and the other consists of girls. Likewise, cheerleaders may perform only at boys' basketball games because those games traditionally draw larger crowds; the gender of the team is, once again, not a factor in making a determination that results in a disparity between the boys' and girls' teams. And when the difference is treated as a facial gender classification, it is unlikely that the school district's justification for the different treatment – that the cheerleaders simply like performing before larger crowds – would achieve the "exceedingly persuasive" standard. Further, it would be an administrative nightmare for a school district to even attempt to operate boys' and girls' teams without creating even the slightest difference. Sadly, as a result of the Court of Appeals' decision, the only infallible approach for school districts that wish to avoid future facial gender discrimination claims is to eliminate separate-gender athletic teams.

In the past, colleges and universities were placed in the unenviable position of eliminating athletic teams in order to comply with the equality requirements of Title IX. The

discourse that this practice created eventually led to a new interpretation of complying with Title IX by the Department of Education, Office of Civil Rights.[4] Now, high schools may have to consider the same difficult decisions and follow that "disfavored practice" in order to comply with the Equal Protection Clause, as interpreted by the Court of Appeals.

II. Courts Must Proceed with Caution When Asked to Determine Local Policy Issues on Behalf School Districts.

Judicial deference to academic judgment in a range of areas is consistent with the principle of academic independence that the Court of Appeals' decision disregards. Courts have been chary to supplant educational judgment when doing so would interfere with a school board's good faith performance of its core functions.

In particular, this Court has repeatedly recognized that "[n]o single tradition in public education is more deeply rooted than local control over the operation of schools." *Milliken v. Bradley,* 418 U.S. 717, 741 (1974); *see e.g., Dayton v. Brinkman,* 433 U.S. 406, 410 (1977) ("[O]ur cases have...firmly recognized that local autonomy of school districts is a vital national tradition."). Further, this Court has always been "reluctan[t] to trench on the prerogatives of state and local educational institutions." *Regents of the University of Michigan v. Ewing,* 474 U.S. 214, 226 (1985).

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[4] United States Department of Education, Office of Civil Rights, July 11, 2003, *Dear Colleague Letter* ("OCR hereby clarifies that nothing in Title IX requires the cutting or reduction in order to demonstrate compliance with Title IX, and that the elimination of teams is a disfavored practice.").

That reluctance is grounded both in federalism concerns and in a healthy awareness of limited judicial competence in educational administration. *See San Antonio Independent School District v. Rodriguez,* 411 U.S. 1, 42-43 (1973) (courts lack "specialized knowledge and expertise" educational policy). Because federal courts are not "suited to evaluate the substance of the multitude of academic decisions" made by public educational institutions, those institutions are granted "the widest range of discretion" in carrying out their educational missions. *Ewing*, 474 U.S. at 226 n. 11 (internal quotation omitted).

On a number of occasions, this Court has affirmatively passed at opportunities to second-guess the educational decisions of school officials. In *Wood* v *Strickland*, 420 U.S. 308 (1975), for example, this Court opined that

> [i]t is not the role of the federal courts to set aside decisions of school administrators which the court may view as lacking a basis in wisdom or compassion....This system of public education that has evolved in this Nation relies necessarily upon the discretion and judgment of school administrators and school board members.

Wood, supra at 326.

And more recently, this Court was asked to interpret the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232g, to determine if the federal law prohibits students from grading one another's papers. This Court used the opportunity to again acknowledge that it will hesitate before interpreting a federal statute to effect a substantial change in the balance of federalism, unless that is the manifest

purpose of the legislation. In emphasizing this point, this Court stated:

> We doubt Congress meant to intervene in this drastic fashion with traditional state functions. Under the Court of Appeals' interpretation of FERPA, the federal power would exercise minute control over specific teaching methods and instructional dynamics in classrooms throughout the country. The Congress is not likely to have mandated this result, and we do not interpret the statute to require it.

Owasso Indep. Sch. Dist. v *Falvo*, 543 U.S. 426 (2002)

Not only is local control a longstanding tradition in the United States, but it also serves important interests. For example, according to this Court, "local control over the educational process affords citizens an opportunity to participate in decision-making, permits the structuring of school programs to fit local needs, and encourages experimentation, innovation, and a healthy competition for educational excellence." *Milliken*, 418 U.S. at 742.

Undoubtedly, the decision of the Court of Appeals weakens the local control of school districts in the Sixth Circuit and *discourages* experimentation and innovation. Ironically, this decision comes at a time when schools are being enticed with the promise of additional federal funds for developing single-sex schools. A provision of the No Child Left Behind Act of 2001, 20 U.S.C. 7215(a)(23) (Supp. I 2003), provides for the allocation of federal funds to local educational agencies for "innovative assistance programs," including "[p]rograms to provide same-gender schools and classrooms." For most school districts, however, the risk of costly litigation relating to minor differences between all-boys

and all-girls schools and classrooms will likely outweigh the prospect of receiving whatever additional funding the federal government can provide. It is difficult to see how a school could prove an exceedingly persuasive justification for different lunch menus, for example, between two single-gender schools. Much like scheduling seasons for single-gender athletic teams, establishing lunch menus for a school is one of many administrative decisions that must be made in managing the school. Such decisions will inevitably create minor differences between two programs or schools, while overall, they remain substantially equal. Thus, to place the burden of proving an exceedingly persuasive justification for inconsequential differences on school boards has the effect of diminishing the board's local authority to establish a single-gender school as an educational option for the district's students.

Amicus does not take a position on the issue of whether offering single-gender schools is a right or wrong option for public school districts. However, if a local school board diligently researches the issue of single-gender schools and classrooms and makes a sound educational decision based on the district's historical experiences and local conditions, the school board should at least be given the opportunity to carryout an innovative plan for establishing single-gender programs without the burden of justifying every minor detail in court. Unfortunately, the Court of Appeals' decision takes away that opportunity and ignores the counsel of this Court, which has advised other courts "to refrain from imposing on the States inflexible constitutional restraints that could circumscribe or handicap the continued research and experimentation so vital to finding even partial solutions to educational problems and to keeping abreast of ever-changing conditions." *San Antonio Independent School District,* 411 at 42-43.

The decision of the Court of Appeals necessitates this Court to reaffirm the educational discretion properly vested in state and local education officials, acting within legal parameters, to practice their core educational mission by pursuing bold and visionary ideas to raise student achievement and provide more educational options for all students.

CONCLUSION

For the reasons set forth above, MASB submits that the petition for a writ of certiorari should be granted and the judgment of the Sixth Circuit should be reversed.

Respectfully submitted,

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